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No. 99-1240

IN THE

Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES and THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

v.

PATRICIA GARRETT and MILTON ASH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM OF RESPONDENTS

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
A. Appellant Patricia Garrett.	1
B. Appellant Milton Ash.	4
I. Respondents Urge This Court To Grant Certiorari On Question I Of The Petition For Writ Of Certiorari Which Concerns Titles I And II Of The ADA.	6
II. This Court Should Deny Petitioners' Petition For Writ Of Certiorari As To Question II. There Is No Conflict Among The Circuits As To Whether A State May Voluntarily Waive Its Eleventh Amendment Immunity Under Section 504 Of The Rehabilitation Act Of 1973 By Receiving Federal Funds Conditioned Upon Such A Waiver.	8
A. Congress Unequivocally Expressed That as a Condition of Receiving Federal Funds, A State Must Waive Any Eleventh Amendment Immunity as to Suits under Section 504. ...	8
B. No Conflict Exists Among the Circuits. ...	13
Conclusion	15

TABLE OF CITED AUTHORITIES

Page

Cases:

Alden v. Maine, 727 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) 12

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985) 11, 13

Alsbrook v. City of Maymelle, 684 F.3d 825 (8th Cir. 1999), *cert. granted in part by* 68 USLW 3487 (Jan. 25, 2000) (No. 99-423) 6

Bell v. New Jersey, 461 U.S. 773 (1983) 12

Bradley v. Arkansas Dept. of Education, 189 F.3d 745 (8th Cir. 1999) 14

Brown v. North Carolina Division of Motor Vehicles, No. 99-424 7

Clark v. California, 123 F.3d 1267 (9th Cir.), *cert denied*, 524 U.S. 937 (1998) 12, 13

College Savings Bank v. Florida Post Secondary Education Expense Board, 119 S. Ct. 2219 (1999) 14

Debose v. Nebraska, 186 F.3d 1087 (8th Cir.), *petition for cert. filed*, 68 U.S.L.W. 3391 (Dec. 1, 1999) (No. 99-940) 7

Cited Authorities

Page

Delaware Dep't of Health & Soc. Servs. v. Department of Educ., 772 F.2d 1123 (3rd Cir. 1985) 14

Department of Educ. v. Katherine D., 727 F.2d 809 (9th Cir. 1983), *cert. denied*, 471 U.S. 1117 (1985) 14

Dickson v. Florida Dept. of Corrections, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3397 (Jan. 21, 2000) (No. 98-829) 6

Florida Nursing Home Ass'n v. Page, 616 F.2d 1355 (5th Cir. 1980), *rev'd due to the absence of a clear statement sub nom. Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) 14

Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 112 S. Ct. 102 (1992) 12

George Mason University v. Litman, 120 S. Ct. 2000 WL 198966 (U.S. Feb 22, 2000) 15

In re Innes, 184 F.3d 1275 (10th Cir. 1999) 12

Jim C., et al. v. Arkansas Department of Education, 197 F.3d 958 (8th Cir. December 14, 1999) 14

Lane v. Pena, 518 U.S. 187, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996) 12, 13

Cited Authorities

Page

Litman v. George Mason University, 186 F.3d 544 (4th Cir. 1999) 14

Little Rock Sch. Dist. v. Mauney, 183 F.3d 816 (8th Cir. 1999) 12, 14

Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) 12

Mitten v. Muscogee Co. Sch. Dist., 877 F.2d 932 (11th Cir. 1989) 13

New York v. United States, et al., 505 U.S. 144 (1992) 12

Premo v. Martin, 119 F.3d 764 (9th Cir. 1997), *cert. denied*, 522 U.S. 1147 (1998) 14

Sandoval v. Hagen, 197 F.3d 484 (11th Cir. 1999) . 12, 14

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 13

Zimmerman v. Oregon Department of Justice, No. 99-243 7

Cited Authorities

Page

Statutes:

20 U.S.C. § 1400, *et seq.* 11

20 U.S.C. § 1403 12

29 U.S.C. § 794 ..... *passim*

29 U.S.C. § 794a(a)(2) 10

29 U.S.C. § 794(d) 9

29 U.S.C. § 2614 3

42 U.S.C. § 12101, *et seq.* 1

42 U.S.C. § 2000d-7 .....9, 11, 12, 13

42 U.S.C.A. § 2000d, *et seq.* 10

United States Constitution:

Eleventh Amendment 1, 5, 6, 7, 8, 10, 12, 13, 14

Fourteenth Amendment 6, 8, 9

As will be explained herein, Respondents urge this Court to accept certiorari under Question I of the Petitioners' Petition for Writ of Certiorari. Question I concerns whether a State is entitled to Eleventh Amendment immunity relative to Titles I and II of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, (hereinafter the "ADA"). As to Question II, however, 29 U.S.C. § 794 regarding Eleventh Amendment immunity relative to Section 504 of the Rehabilitation Act of 1973 (hereinafter "Section 504") 29 U.S.C. § 794, Respondents urge this Court to deny certiorari. Article I, Section 8 of the Spending Clause provides an independent basis for concluding that a State is not immune from suits brought under Section 504. In fact, Petitioners waived any Eleventh Amendment immunity relative to Section 504 by willingly accepting federal financial assistance.

STATEMENT OF THE CASE

A. Appellant Patricia Garrett.

Ms. Garrett began working with the University of Alabama in Birmingham ("UAB') in 1977. (Garrett R1-1-3; Garrett R1-47-Aff. ¶ 2[1]; Garrett R1-48-15) During her tenure with UAB, Ms. Garrett received several promotions, the latest being in June 1992, to the position of Director of OB/GYN/Neonatal Services. (Garrett R1-1-3) Throughout her fifteen years with UAB, Ms. Garrett never received any written reprimands or other serious discipline. (Garrett R1-47- Aff. ¶ 4)

1. Ms. Garrett's Affidavit was attached to Plaintiff's Opposition to Defendant's Motion to Amend its Motion for Partial Summary Judgment. Consequently, for purposes of clarifying citations to the Record on Appeal and for the convenience of the Court, Respondents have inserted the abbreviation (Aff.) and have further identified the relevant paragraph numbers when referring to Ms. Garrett's Affidavit.

On August 27, 1994, Ms. Garrett was diagnosed with breast cancer. She immediately underwent a lumpectomy, a node removal and a biopsy. (Garrett R1-48-48) Following the surgery, Ms. Garrett also began a regime of radiation treatment, followed by six months of chemotherapy. The chemotherapy lasted through June 1995. (Garrett R1-47- Aff. ¶ 5; Garrett R1-48-49-50) Ms. Garrett alleges that she meets the definition of a person with a disability, as that term is defined under the ADA and Section 504. Even with mitigating measures, Ms. Garrett was substantially limited her ability to, *inter alia*, sleep, care for herself, and work (albeit, as described below, she was able to perform the essential functions of her position with UAB).

In addition, Ms. Garrett has a history of disability and UAB perceived her as disabled. (Garrett R1-1-2; Garrett R1-47- Aff. ¶¶ 7-8; Garrett R2-25) For example, after Ms. Garrett was diagnosed with breast cancer, UAB consistently urged Ms. Garrett to take medical leave, indicating that due to her disability, Ms. Garrett did not look well and needed rest. (Garrett R1-47-Aff. ¶¶ 10, 14-15; Garrett R1-48-154-55, 159-60) UAB management made these remarks despite the fact that Ms. Garrett was fully capable of performing the essential functions of her position. Further, Ms. Garrett actually did continue to perform all of her job duties by taking certain proactive measures such as scheduling her chemotherapy on Friday afternoons in order to avoid disrupting her work schedule. (Garrett R1-47-Aff. ¶ 9) UAB engaged in further discriminatory actions, such as advertising Ms. Garrett's position and locking her out of her computer while she was undergoing radiation treatment and chemotherapy. (Garrett R1-47-Aff. ¶ 13) UAB also repeatedly threatened to transfer Ms. Garrett to a less demanding job, due to the existence of her disabling condition. (Garrett R1-1-4, 5; Garrett R1-47-Aff. ¶ 15; Garrett R1-48-199-201, 205)

Despite UAB's discriminatory conduct, Ms. Garrett continued to perform the essential functions of her position from September 1994 until March 1995. However, after Ms. Garrett's subordinate informed Ms. Garrett that UAB intended to transfer Ms. Garrett to a satellite hospital in a temporary position, and that the subordinate would be replacing her, Ms. Garrett took Family and Medical leave. (Garrett R1-47-Aff. ¶¶ 15-16) The leave was based on Ms. Garrett's physician's recommendation that Ms. Garrett focus on her recovery while undergoing chemotherapy, without the added stress created by UAB's continuous discriminatory acts. (Garrett R1-47-Aff. ¶ 16; Garrett R1-48-204-205, 249)

Upon Ms. Garrett's return from family medical leave, she returned to her previous position where, again, she performed the essential functions of her position. However, approximately one to two weeks after her return, Ms. Garrett's supervisor informed Ms. Garrett that UAB had determined that Ms. Garrett could no longer fill the position of Director of OB/GYN/Neonatal Services. Instead, UAB gave Ms. Garrett the ultimatum of either transferring to an inferior position or termination. (Garrett R1-1-5; Garrett R1-47-Aff. ¶ 17) Ms. Garrett was ultimately offered a position in another department of the University. This transfer represented a demotion and a substantial reduction in pay. (Garrett R1-47-Aff. ¶ 19)

Ms. Garrett's Complaint alleges that UAB's actions constitute, *inter alia*, intentional discrimination and retaliation in violation of the ADA and Section 504.[2] (Garrett R1-1-6) She seeks damages and equitable relief. (Garrett R1-1-8)

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2. Ms. Garrett also alleged a violation of the Family and Medical Leave Act, 29 U.S.C. § 2614 (hereinafter "FMLA"). As will be explained, this issue is not before this Court.

B. Appellant Milton Ash.

Appellant Ash also is a person with a disability, as that term is defined by the ADA and Section 504. Mr. Ash has severe chronic asthma, sleep apnea, obstructive pulmonary disease, and diabetes. Mr. Ash must utilize an inhaler to breathe; and he is required to utilize a respirator and mask, when necessary. (Ash R1-1-2; Ash R1-14-1, ¶¶ 2-5) Even with these measures, Mr. Ash is substantially limited, *inter alia*, in the major life activities of breathing, sleeping, caring for himself, and working (albeit, as described below, he was able to perform the essential functions of his position with ADYS).

Mr. Ash began working with the Alabama Department of Youth Services (hereinafter "ADYS"), as a Security Officer in 1993. (Ash R1-1-3) Mr. Ash performed his job well. (Ash R1-14-Exhs. 5-10, 24) Consequently, in 1996, ADYS promoted Mr. Ash to the classification of Youth Services Security Officer. (Ash R1-14-Exh. 1, ¶ 10) Mr. Ash was qualified to perform the essential functions of this position.

As a Security Officer, Mr. Ash was required to work in a small gate house where he was constantly exposed to intense cigarette fumes. (Ash, R1-14-Exh. 1, ¶¶ 14-15) ADYS has a "No Smoking" policy which, if enforced, would have essentially eliminated the constant presence of cigarette fumes in the gate house. ADYS also required that Mr. Ash drive vehicles which, because they were not regularly maintained, emitted excessive noxious fumes. (Ash R1-1-3; Ash R1-14-Exh. 1, ¶ 12)

Due to Mr. Ash's disability, Mr. Ash and his physicians repeatedly requested that ADYS provide Mr. Ash with reasonable accommodations. (Ash R1-14-Exh. 1, ¶¶ 13-14, 16-17) These reasonable accommodations included asking ADYS to maintain and repair ADYS vehicles so they would not emit toxic fumes, and to enforce its "No Smoking" policy. However, ADYS repeatedly refused to comply with these requests. It failed to enforce its "No Smoking" policy, and it has continued to require Mr. Ash to drive cars which emit carbon monoxide and other noxious fumes. (Ash R1-14-Exh. 1, ¶¶ 16-17, 21; Ash R1-14-Exhs. 12, 17-18, 25, 32) As a result, Mr. Ash was hospitalized for severe asthma attacks. (Ash R1-14-Exh. 1, ¶¶ 18-19; Ash R1-14-Exhs.13, 20)

Mr. Ash was also clearly perceived as disabled when in November 1995, Dr. Booth, Superintendent of Youth Services stated to Mr. Ash, "why don't you just go ahead and quit, . . . just go home and draw disability." (Ash R1-14-Exh. 1, ¶ 20)

Consequently, Mr. Ash filed a timely Charge of Discrimination with the EEOC alleging that ADYS" actions constituted a violation of the ADA and Section 504. (Ash R1-1-4) Subsequent to the filing of his Charge, ADYS has also retaliated against him. (Ash R1-1-5) In his Complaint, Mr. Ash alleges that ADYS engaged in intentional discrimination and retaliation and that it further failed to reasonably accommodate him under the ADA and Section 504. He, too, seeks damages and equitable relief. (Ash R1-1-6, 7)

Prior to the completion of significant discovery, Petitioners filed Motions for Summary Judgment asserting that they were immune under the Eleventh Amendment. The District Court, which coincidentally had both cases, granted Summary Judgment on all counts in a Joint Opinion. Upon appeal, the

Eleventh Circuit Court of Appeals reversed the District's Court's Opinion relative to Section 504 and the ADA. The Court of Appeals held that Section 504 and the ADA constituted a proper exercise of Congressional power under Section 5 of the Fourteenth Amendment and that the State, thus, did not enjoy Eleventh Amendment immunity. The Eleventh Circuit, however, upheld the Court's Opinion relative to the FMLA.[3]

I.

RESPONDENTS URGE THIS COURT TO GRANT CERTIORARI ON QUESTION I OF THE PETITION FOR WRIT OF CERTIORARI WHICH CONCERNS TITLES I AND II OF THE ADA.

This Court's grants of Certiorari in *Dickson*, No. 98-829, and *Alsbrook*, No. 99-423, both of which were settled before oral argument, indicates that this Court wishes to resolve the issue of whether a State enjoys Eleventh Amendment immunity relative to both Titles I and II of the ADA. Indeed, while Petitioners and Respondents take opposing positions with regard to the ultimate answer to this question, Respondents acknowledge that this issue needs resolution to provide guidance to the courts below. This is especially urgent given the split of opinion among the Circuits. As these cases involve both Titles I and II of the ADA, they are especially well situated to allow this Court to review both Titles contemporaneously. They are also well situated as they involve employment issues regarding both intentional discrimination and reasonable accommodation claims under the ADA.

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3. Neither party has sought certiorari on any issue arising under the FMLA.

Additionally, other cases pending before this Court do not present as clear and simple a posture as does *Garrett, et al.* For example, *Zimmerman v. Oregon Department of Justice*, No. 99-243, presents only an issue arising under Title II. Further, the Court of Appeals dismissed the complaint on an issue of statutory construction and not on the basis of Eleventh Amendment immunity. Thus, the Court would have to grant certiorari on both the Eleventh Amendment and statutory issues in order to provide the petitioner any relief. Moreover, the Eleventh Amendment immunity question in the *Zimmerman* case was raised for the first time by the plaintiff in his petition to this Court as a possible defense that the State might assert. The State adopted the assertion of immunity for the first time, only after this Court called for a response to the petition.

Debose v. Nebraska, No. 99-940 also has difficulties not present in *Garrett, et al.*, as it presents a more complicated scenario. *Debose*, which presents only a Title I issue (notwithstanding an apparent typographical error in the opinion), is before this Court after a lengthy jury trial for which the content, quality and strength of the evidence presented has been neither summarized nor reviewed by any lower court. Reviewing a case in this posture allows for the possibility that unknown factual configurations or procedural irregularities in the case may vitiate consideration of the constitutional question.

Finally, *Brown v. North Carolina Division of Motor Vehicles*, No. 99-424, raises a very narrow question regarding the validity of a particular Justice Department regulation which was promulgated solely under Title II, which is both unsettled and unlikely to occur on a frequently repeated basis.

Thus, Respondents urge this Court to accept Question I of Petitioners' Petition, *Garrett, et al.*, which relates to both Titles I and II. Additionally, *Garrett, et al.* does not possess a long and complicated record and it presents factual scenarios involving intentional discriminatory conduct and claims regarding a State's failure to reasonably accommodate a person with a disability.

II.

THIS COURT SHOULD DENY PETITIONERS' PETITION FOR WRIT OF CERTIORARI AS TO QUESTION II. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO WHETHER A STATE MAY VOLUNTARILY WAIVE ITS ELEVENTH AMENDMENT IMMUNITY UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973 BY RECEIVING FEDERAL FUNDS CONDITIONED UPON SUCH A WAIVER.

A. Congress Unequivocally Expressed That as a Condition of Receiving Federal Funds, A State Must Waive Any Eleventh Amendment Immunity as to Suits under Section 504.

This Court, however, should deny Petitioners' Writ as to Question II. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, provides a basis for subjecting a State to Section 504 claims which is completely independent from Section 5 of the Fourteenth Amendment.[4] In both enacting

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4. However, if this Court decides to accept certiorari on this issue, Respondents will assert their position that the statute represents a valid abrogation of the states' eleventh immunity pursuant to Section 5 of the Fourteenth Amendment, in addition to Respondents' argument herein. Further, it should be noted that Question II of the (Cont'd)

Section 504, as well as amending the Act in 42 U.S.C. § 2000d-7, Congress relied on the Spending Clause under Article I, Section 8. In so doing, Congress clearly conditioned its provision of federal financial assistance upon a State's express waiver of immunity. 42 U.S.C. § 2000d-7.

Section 504 of the Rehabilitation Act prohibits a recipient of federal financial assistance from discriminating against persons with disabilities.[5] 29 U.S.C. § 794, states:

> No otherwise qualified individual with a disability in the United States, as defined in Section 706(20) of this Title shall, solely by reason of his/her disability, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance or any program or activity conducted by any Executive agency, or by the United States Postal Service . . .

(Cont'd)
Petition is inaptly worded, in that it implies that the only basis for finding that a State is subject to suit under Section 504 is through abrogation of a State's immunity under Section 5 of the Fourteenth Amendment. As explained, a separate basis for finding that States do not enjoy immunity relative to a Section 504 claim, is Congress' power under the Spending Clause. Finally, it should be noted that Respondents have repeatedly argued to the courts below that Petitioners waived immunity by accepting funds under Section 504. However, neither Petitioner, nor the courts below, have addressed this argument.

5. The definition of disability is the same under both the ADA and Section 504. Likewise, the standard for determining what constitutes employment discrimination under Section 504 is identical to the standard under Title I of the ADA. 29 U.S.C. § 794(d).

Further, "program or activity" includes:

> a department, agency, special purpose district, or other instrumentality of a State or Local government; or the entity of such State or Local government that distributes such assistance and each department or agency (and each other State or Local government entity, to which the assistance is extended, in the case of assistance to a State or Local government; . . .

Thus, discrimination includes limiting, segregating, or classifying either a job applicant or an employee in a way which adversely affects his or her employment opportunities. It also prohibits a recipient of federal financial assistance from excluding individuals from job opportunities or benefits or from failing to make a reasonable accommodation to the known physical or mental limitations of a qualified individual, unless the entity can demonstrate an undue hardship. 29 U.S.C. § 794.

29 U.S.C. § 794a(a)(2) provides the remedial scheme for a violation of Section 504. Notably, the "remedies, procedures, and rights set forth in Titles VI of the Civil Rights Act of 1964 (42 U.S.C.A. § 2000d, *et seq.*) shall be available" to any person who has experienced discrimination under Section 504. Significantly, 42 U.S.C. 2000d, *et seq.*, also provides the remedial scheme for redressing violations of Title VI and IX.

While it is clear that the mere receipt of federal funds cannot establish that a State has consented to suit in Federal Court, receipt of funds will constitute a waiver of Eleventh Amendment immunity if the statute clearly apprizes the State

of this condition. No State is ever required to accept federal funds. However, Congress is well within its power to condition the receipt of its provision of federal funds upon the recipient's assurance that it will not engage in discriminatory actions towards persons with disabilities. As Petitioners willingly accept federal financial assistance, including assistance that allows them to provide services to persons with disabilities, they must comply with such conditions.[6]

After this Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985), Congress amended the Rehabilitation Act, in pertinent part, to state that, "a state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973. . . ." 42 U.S.C. § 2000d-7. This amendment also clarifies that in any suit against the state, all remedies which would be available against any other public or private party, including those at law, are also available against the state. The language of 42 U.S.C. § 2000d-7 demonstrates that Congress unequivocally notified States that they would waive their Eleventh Amendment immunity to Section 504 suits by accepting federal financial assistance.

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6. UAB has acknowledged that it is a recipient of federal financial assistance. Indeed, UAB receives monies to redress issues relative to persons with disabilities by accepting federal funds under the State's Medicaid and Medicare plans. ADYS has not denied its receipt of federal financial assistance. It, too, receives money for educating children with disabilities under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* and Medicaid.

This Court has already characterized Section 2000d-7 as meeting its requirement that Congress unambiguously express its intent to remove the Eleventh Amendment as a bar to private suits against States in federal court. In *Lane v. Pena*, 518 U.S. 187, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996) this Court stated that 2000d-7 constituted an "unambiguous waiver of the State's Eleventh Amendment immunity." *See also Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 112 S. Ct. 102 (1992); *Clark v. California*, 123 F.3d 1267 (9th Cir.), *cert denied*, 524 U.S. 937 (1998). Other Courts of Appeals that have addressed the issue agree that the language of 42 U.S.C. § 2000d-7 is sufficient to put recipients on notice that acceptance of federal funds constitutes a waiver of Eleventh Amendment immunity. *See Sandoval v. Hagen*, 197 F.3d 484 (11th Cir. 1999); *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816, 831-832 (8th Cir. 1999) (addressing same language in 20 U.S.C. § 1403); *In re Innes*, 184 F.3d 1275, 1282-1283 (10th Cir. 1999) (dictum).

Indeed, one of the purposes of the Eleventh Amendment is to protect the "financial integrity of the States," *Alden v. Maine*, 727 U.S. 706, 119 S. Ct. 2240, 2264, 144 L. Ed. 2d 636 (1999). As such, it is appropriate to permit each State to analyze and decide whether to forego the federal funds, or accept the federal money with the condition that it can be sued in Federal Court. But once that choice is made, "state sovereignty is not violated by requiring the state to honor its obligations pursuant to receipt of those funds." *See New York*, 505 U.S. at 168; *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 271 (1991). *Bell v. New Jersey*, 461 U.S. 773, 790 (1983).

Significantly, this outcome is not inconsistent with this Court's Decision in *Seminole Tribe* because when Congress enacted legislation under the Spending Clause, it did not abrogate Eleventh Amendment immunity. Rather, it conditioned the receipt of federal funds on a State's voluntary waiver of immunity. Thus, Section 2000d-7 does not represent an abrogation issue, but rather, an express waiver of immunity. Further, Section 2000d-7, embodies exactly the type of unambiguous condition discussed by the Court in *Atascadero*, placing States on express notice that part of the "contract" for receiving federal funds is the requirement that they consent to suit in federal court for alleged violations of Section 504. (*See also Mitten v. Muscogee Co. Sch. Dist.*, 877 F.2d 932 (11th Cir. 1989))

B. No Conflict Exists Among the Circuits.

In addition, there is no conflict among the Circuits with regard to the issue of waiver. The only courts which have even examined this issue relative to Section 504 are the Eighth and Ninth Circuits. In *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997), the Ninth Circuit held that the state had unequivocally waived Eleventh Amendment immunity by accepting federal funds pursuant to the Rehabilitation Act, 42 U.S.C. § 2000d-7. Therein the court noted that Section 504 expressly conditions a State's waiver of its Eleventh Amendment immunity by accepting federal financial assistance. Relying on this Court's decision in *Atascadero*, the Ninth Circuit found that Section 504 includes an express statement of intent to condition a State's receipt of federal financial assistance on its express waiver of Eleventh Amendment immunity. Finally, the court took note of this Court's characterization of 42 U.S.C. § 2000(d)-7 as "an unambiguous waiver of the State's Eleventh Amendment immunity." *Lane*, 518 U.S. 187 (1996).

While the Eighth Circuit Court of Appeals in *Bradley v. Arkansas Dept. of Education*, 189 F.3d 745 (8th Cir. 1999), initially held that Section 504 did not constitute a valid exercise of Congress' spending power, the portion of the decision which relates to the spending clause issue was specifically vacated by the Court of Appeals in *Jim C., et al. v. Arkansas Department of Education*, 197 F.3d 958 (8th Cir. December 14, 1999), after granting a petition for a rehearing *en banc* by the United States.

Finally, it should be noted that all the Courts of Appeals that have addressed the issue, both before and after *College Savings Bank v. Florida Post Secondary Education Expense Board*, 119 S. Ct. 2219 (1999), have held that so long as Congress has made its intentions clear, Congress has the power to condition the receipt of federal funds on a State recipient's waiver of Eleventh Amendment immunity.[7] Because the issue of waiver under Section 504 has not been raised by either Petitioner, further review of this issue is not warranted.

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7. *See Litman v. George Mason University*, 186 F.3d 544 (4th Cir. 1999); *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999) (Title VI of the Civil Rights Act of 1964); *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816 (8th Cir. 1999); *Department of Educ. v. Katherine D.*, 727 F.2d 809, 818-819 (9th Cir. 1983) (Education for All Handicapped Children Act of 1975), *cert. denied*, 471 U.S. 1117 (1985); *Florida Nursing Home Ass'n v. Page*, 616 F.2d 1355, 1363 (5th Cir. 1980) (Medicaid), *rev'd due to the absence of a clear statement sub nom. Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981); *Premo v. Martin*, 119 F.3d 764, 770-771 (9th Cir. 1997), *cert. denied*, 522 U.S. 1147 (1998); *Delaware Dep't of Health & Soc. Servs. v. Department of Educ.*, 772 F.2d 1123, 1138 (3rd Cir. 1985).

Finally, it should be noted that just recently, this Court denied certiorari on this issue. *See George Mason University v. Litman*, S. Ct. 2000 WL 198966 (U.S. Feb 22, 2000) (No. 99-596).

CONCLUSION

For each of the reasons stated herein, Respondents urge this Court to grant certiorari on Petitioners' Questions I concerning Titles I and II of the ADA and to deny certiorari with regard to Question II.

Respectfully submitted,

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